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TRANSCRIPT OF RECORD

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT

No. 16753

DULIEN STEEL PRODUCTS, INC.

Appellant

versus

ELBERT B. CONNELL

Appellee

Appeal from United States District Court
for the Western District of Louisiana

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SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

- - - - O - - - -

CIVIL ACTION
NO. 5474

DULIEN STEEL PRODUCTS, INC.

vs.

ELBERT B. CONNELL

- - - - O - - - -

TRANSCRIPT OF APPEAL
TAKEN BY PLAINTIFF

TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

- - - - O - - - -

APPEARANCES:

Messrs.
GEIGER & HARMEL,
231 Tower Building
Washington, D. C.

HEROLD, COUSIN & HEROLD
418 Market Street
Shreveport, Louisiana

Appellant

MECOM, SCOTT & DESPOT
Louisiana Bank Building
Shreveport, Louisiana

Appellee

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

(Title Omitted)
No. 5474

MOTION FOR TEMPORARY RESTRAINING ORDER

Comes now the plaintiff, Dulien Steel Products, Inc., appearing herein through its attorney of record, and respectfully shows to the Court as follows:

1.

That on or about May 8, 1956, there was filed before this Honorable Court a complaint for injunction and equitable relief, which is made a part hereof as fully as if copied herein and which is on file in this cause.

2.

That after hearings were had concerning this cause, this Honorable Court, after consideration of all motions and arguments pertaining thereto, set the motion down for trial on July 9, 1956 and issued a temporary restraining order, which is made a part hereof as fully as if copied herein in full and which is on file in this cause.

3.

That inter alia such order stated:

"ORDERED, ADJUDGED AND DECREED, that pending final disposition of Plaintiff's Motion for Preliminary Injunction, defendant, his agents, assigns, or any one acting for or through him or on his behalf are hereby restrained and enjoined from attempting to enforce, execute or collect in any manner upon the judgment here under attack and heretofore obtained by him in the 26th Judicial District Court for the Parish of Webster, Louisiana, being case No. 16333 entitled

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> Elbert B. Connell V. Dulien Steel Products, Inc., until the final decision of the Court on Plaintiff's Motion for Preliminary Injunction."

4.

That those actions and decisions of this Honorable Court were appealed by Elbert B. Connell, the defendant, to the United States Court of Appeals, Fifth Circuit, which Court in its decision rendered on January 18, 1957, stated:

> "We think that it would be premature for us to consider the appeal under the present state of record. The appeal must be DISMISSED."

5.

That the peition for rehearing filed by defendant in the Court of Appeals, Fifth Circuit, was denied on February 13, 1957, no opinion being rendered in connection therewith; and that shortly thereafter, counsel for Dulien Steel Products, Inc., inquired of the Clerk of Court, Western District of Louisiana, as to the time for a hearing on its application for the issuance of a preliminary injunction and was informed such application would be fixed as soon as possible.

6.

That on or about March 27, 1957, through registered mail, counsel for Dulien Steel Products, Inc., was served with a motion and order to show cause in the case of Elbert B. Connell v. Dulien Steel Products, Inc., Suit No. 16,333, Twenty-Sixth Judicial District Court, Webster Parish, State of Louisiana, said order being signed by the Honorable Judge James E. Bolin on March 22, 1957. Copy of the motion and order are attached hereto as Exhibit A.

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7.

That if defendant herein obtains a judgment of condemnation by the State Court and if execution and collection are allowed upon the judgment rendered by the State Court, irreparable damages will be suffered as a result therefrom.

8.

That if defendant causes execution and collection of the State Court judgment, the prior action of this Court may be frustrated and plaintiff's motion for a preliminary injunction and its claim for relief may become moot.

9.

That consideration of plaintiff's motion for a preliminary injunction requires defendant to be restrained from obtaining or enforcing the State Court judgment of condemnation until this Court has acted on said motion.

10.

That defendant will, unless restrained by this Court, cause execution to be issued and will enforce the payment of said judgment to the great and irreparable damage of the plaintiff.

11.

That payment of said State Court judgment is presently secured by a surety bond in the penal sum of $35,000.00 executed by plaintiff as principal and The Indemnity Insurance Company of North America as surety, and an additional $5,000.00 surety bond filed with this Court for damages and attorneys' fees, executed by plaintiff as principal and The

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Indemnity Insurance Company of North America as surety.

12.

That notwithstanding the restraining order of this Honorable Court, hereinbefore set out, the defendant is attempting to execute on the State Court judgment.

WHEREFORE, applicant prays:

1. That Elbert B. Connell and Leroy H. Scott, Jr. be duly cited for contempt of this Court, and further ordered to show cause at an hour and date to be fixed by this Honorable Court, why Elbert B. Connell and Leroy H. Scott, Jr. should not be adjudged in contempt of this Court for proceeding in the State Court, Webster Parish, Louisiana, in violation of the order of this Honorable Court hereinbefore mentioned, restraining any attempt to collect the State Court judgment, such action being contrary to the order issued by this Honorable Court on June 11, 1956; and,

2. That after a hearing on this application that Elbert B. Connell be further and specifically restrained from proceeding with his motion filed in Suit No. 16,333, Twenty-Sixth Judicial District Court, Webster Parish , Louisiana, wherein Dulien Steel Products, Inc., and The Indemnity Insurance Company of North America has been ordered to show cause why they should not be condemned to pay to Elbert B. Connell the amount of judgment in said case.

3. That this Court issue a temporary order, which upon hearing may be made permanent, upon such terms as the Court may deem just, specifically restraining the defendant, his agents and assigns and

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any one acting for or through him or on his behalf, from further proceeding with the aforementioned motion for judgment of condemnation executing upon said judgment or in any manner enforcing its payment.

4. For all general and equitable relief.

GEIGER AND HARMEL

By: /s/ Michael A. Schuchat
Attorneys for Plaintiff
231 Tower Building,
Washington 5, D. C.

OF COUNSEL:

/s/ Steven B. Cowel
Steven B. Cowel
418 Market Street
Shreveport, Louisiana

ATTACHMENT, Exhibit A

ELBERT B. CONNELL	NUMBER 16,333
vs.	TWENTY-SIXTH JUDICIAL DISTRICT COURT
DULIEN STEEL PRODUCTS, INCORPORATED	WEBSTER PARISH, LOUISIANA

MOTION

On motion of ELBERT B. CONNELL, Plaintiff in the above titled and numbered cause, appearing herein through his undersigned attorney of record, and on suggesting tothe Court that:

1.

On the 11th day of June, 1954, judgment was rendered herein in favor of Plaintiff, your petitioner, and against Dulien Steel Products, Incorporated, in the above proceedings.

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2.

Subsequently defendant appealed therefrom to the Supreme Court of Louisiana, where on the 12th day of December, 1955, the judgment of this Court was affirmed. A rehearing was refused on January 16, 1956. A motion to remand was denied on February 21, 1956. The United States Supreme Court denied certiorari on May 7, 1956.

3.

The mover has made every reasonable effort to find property of value owned by the defendant, Dulien Steel Products, Incorporated, and subject to execution; that writ of fieri facias has been returned unsatisfied and all necessary steps have been taken to enforce payment by the said principal, but the Sheriff has returned said writs unsatisfied; Mover is therefore entitled to execution on the said judgment against Indemnity Insurance Company of North America, a bonding company duly authorized to do and doing business in the State of Louisiana, having appointed the Secretary of State as its agent for service of process, surety on the suspensive appeal bond of the said defendant.

4.

The amount of said judgment is Twenty-two Thousand, Two Hundred Twenty-nine and 56/100($22,229.56) Dollars, plus an attorney's fee of One Thousand Dollars ($1,000.00) plus legal interest of five percent (5%) thereon from January 16, 1952, the date of judicial demand, together with all costs herein.

WHEREFORE mover prays that Dulien Steel Products, Incorporated, and Indemnity Insurance Company of North America be ordered

to appear and show cause at a date and hour set by the Court why Indemnity Insurance Company of North America should not be condemned to pay the amount of judgment to plaintiff.

/s/ Leroy H. Scott, Jr.
LEROY H. SCOTT, JR.
Attorney for Petitioner

ORDER

IT IS ORDERED by the Court that Indemnity Insurance Company of North America, surety on the appeal bond of Dulien Steel Products Incorporated herein be and it is hereby ordered to appear on the 5th day of April, 1957, at the hour of 10:00 o'clock a. m. and show cause if any it can, why it should not be condemned to pay the judgment rendered against Dulien Steel Products, Incorporated, in the above proceedings.

Minden, Louisiana, this 22 day of March, 1957.

/s/ James E. Bolin
DISTRICT JUDGE

Filed April 3, 1957
Alton L. Curtis, Clerk

(Title Omitted)
No. 5474

MEMORANDUM FILED BY DEFENDANT

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Chronology

1. 1941 Toucey case strictly interpreted Section 379 of the Judicial Code.
2. 1948 In a general revision of the Judicial Code, Section 379 was amended to what is now Section 2283.
3. 1955 Professor Moore's book published, undoubtedly written in 1954.
4. April 25, 1955 - Amalgamated Clothing Workers of America vs. Richman Brothers decided.
5. 1956 Moore's Federal Rules and Official Forms as amended published.

In this latest work by Professor Moore, we find that he has had an opportunity to review the arguments advanced by him in the second edition of Moore's Federal Practice, Vol. 7, and in discussing Section 2283 of the Judicial Code on page 330, he states as follows, to-wit:

> "The third and last clause certainly overruled the Toucey holding, thereby revitalizing the prior 'relitigation' doctrine; and it was thought that the second clause had reintroduced considerable power and flexibility. See Moore's Commentary on the Judicial Code (1949) 395-417. But Amalgamated Clothing Workers v. Richman (1955) 348 US 511, 75 S ct 452, 99 L ed 600 represents a return to the narrowness of the Toucey philosophy. This case held that although the state court lacked jurisdiction to enjoin the union's activities, a federal district court is, nevertheless, precluded by Sec. 2283 from issuing, in favor of the union, a counter injunction against the employer. The union must obtain relief in the state action; and, if relief is

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> denied, then from the Supreme Court on appellate review. Section 2283 was to be read literally and against federal power."

We believe that the above conclusively settles the matter on the question of jurisdiction in this Court. If it does not, then there remains an important question to be decided, namely:

What law is applicable?

In a diversity case (and you must remember that diversity is the sole claim of Dulien to Federal jurisdiction), it is the state law that must govern. Guaranty Trust vs. York 326 US 99. Erie Railroad vs. Tompkins 304 US 64. The cause of action therefore must necessarily find its support in the state law. Feldman vs. Pennrode 155 F 2d 773. Professor Moore agrees. See page 626 of Vol. 7. This court quoted from Moore in its earlier opinion and stated:

> "'. . . and we believe it is logical and practical to hold that state law prescribes the basis for the additional remedial attack upon the judgment through the independent action as a facet of its general power to determine that res judicata effect of its judgment.'" page 7.

This court in its original opinion also noted that under the state law there was no cause of action. Page 5.

In its original opinion the Court also accepted the philosophy of Angel vs. Bullington to the effect that res judicata applies to all matters that were litigated or were available for litigation, but there was insufficient matter in the record as then constituted to show that the matter of quantum was available.

This deficiency no longer exists, for the record now shows that

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these matters were available for litigation. See the documents attached to defendant's motion for a summary judgment.

Respectfully submitted,

MECOM, SCOTT AND DESPOT

/s/ L. H. Scott, Jr.

by Leroy H. Scott, Jr.

Filed April 3, 1957
Alton L. Curtis, Clerk

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

- - - - O - - - -

DULIEN STEEL PRODUCTS, INC.

Vs. Civil Action No. 5474

ELBERT B. CONNELL

- - - - O - - - -

Transcript of proceedings in the above-entitled action, before the Honorable Ben C. Dawkins, Jr., United States District Judge, at Shreveport, Louisiana, on April 3, 1957.

APPEARANCES:

GEIGER & HARMEL, Attorneys for Plaintiff, by MICHAEL A. SCHUCHAT, of Counsel.

HEROLD, COUSIN & HEROLD, Attorneys for Plaintiff, by STEVEN N. COWEL, of Counsel

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

MECOM, SCOTT & DESPOT, Attorneys for Defendant, by LeROY H. SCOTT, JR., of Counsel.

SIDNEY YOUNG, Official Reporter, United States District Court.

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THE COURT: The Court has called the attorneys of record in this case heretoday to consider various matters.

On yesterday, Mr. Steven Cowel, one of the counsel for plaintiff, presented to the Court an application for a temporary restraining order to stay the execution of the state court judgment until a hearing might be held upon the application for a preliminary injunction. The Court declined to sign the restraining order as presented with the statement to Mr. Cowel that we were of the opinion opposing counsel should be heard fully before any further action is taken by the Court.

We, of course, had read the decision of the Honorable Fifth Circuit Court of Appeals handed down on January 22, 1957, dismissing the appeal taken by Elbert B. Connell, the defendant here, including that part of the Court's opinion wherein it was stated:

> "It is not at all clear that the Court below would actually have granted a preliminary injunction, for there are several legal questions that might well have been passed on at such a hearing."

We are of the opinion that this statement by Judge Tuttle, as the organ of the Court, was an invitation to

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this Court to re-examine several of the serious questions raised by motions of defendant upon original consideration of the case including, particularly, the question of jurisdiction vel non, the question of res judicata and the still further question, basic in the law of injunctions, that a preliminary injunction will not be issued if, upon examination of the entire record, it appears likely that the applicant for injunction will not prevail.

Now, all counsel are present and I think for the record perhaps it would be well for you, Mr. Cowel, to re-tender your application for a restraining order; and in that connection, let the record show that while the original decision by the Court of Appeals was handed down on January 18, 1957 and application for re-hearing by that Court was denied on February 13, 1957, and while the mandate of the Appellate Court was filed with the Clerk of this Court on March 1, 1957, the supplemental application for a restraining order was not filed or attempted to be filed in this Court until yesterday, April 2, 1957, more than thirty days later.

In the meantime, the Court had received a copy of a letter by defense counsel, Mr. Scott, addressed to Mr. Cowel, plaintiff's counsel, advising him, under date of March 26, 1957 that defendant did not consider himself under any further restraint by order of this Court and that, "We have therefore caused appropriate proceedings to secure the enforcement of the judgment of the 26th Judicial District Court in the case of Connell versus Dulien, No. 16, 333, to issue.

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"This letter is being written to advise you of that fact so that you may take such action as you may be entitled."

At the beginning, on the very first hearing in this matter the Court itself raised the serious question of jurisdiction. That matter was briefed thoroughly by both sides and in our oral ruling made in the presence of all counsel on June 8, 1956, we overruled the motion to dismiss for lack of jurisdiction, almost entirely on the basis of statements made by Professor Moore in Volume 7 of the 2nd Edition of his work on Federal Practice, in which he discussed Section 2283 of the Judicial Code, and concluded that in an independent action in equity to stay the execution of a final state court judgment which allegedly had been obtained upon the basis of fraud or mistake, that a federal district court, in the exercise of its equitable powers, and "Where necessary in aid of its jurisdiction", as stated in Section 2283, would have jurisdiction and power to issue such an injunction.

Apparently that statement by Professor Moore was based upon his interpretation of the section, and his belief that it had completely overruled the decision of the United States Supreme Court in Toucey versus New York Life Insurance Company, decided in 1941 and reported at 314 U.S. 118, 62 S Ct 139, 86 L Ed 100, 137 A.L.R. 967.

Our attention now has been directed by defense counsel to the 1956 edition of Moore's Federal Practice, at

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pages 329 and 330, wherein he again discusses this subject and concludes that the later decision by the Supreme Court in Amalgamated Clothing Workers v. Richmond, decided in 1955 and reported at 348 U. S. 511, 75 S Ct 452, 99 L Ed 600, " . . . represents a return to the narrowness of the Toucey philosophy. It definitely held that, although the state court lacked jurisdiction to enjoin the union's activities, a federal district court, nevertheless, was precluded by Section 2283 from issuing in favor of the union a counter injunction against the employer."

Just prior to this statement, Professor Moore confesses error in his earlier views, referring specifically to 395-417 of his commentary on the Judicial Code, 1949 Edition, which is virtually identical in import to the discussion at pages 646, 35 seq., of Volume 7 of Moore's Federal Practice, Second Edition, published in 1948.

In other words, after having read this most recent statement of view by Professor Moore, and having also examined carefully the language of Mr. Justice Frankfurter, as the organ of the majority in the Amalgamated Clothing Workers case, we now are of the opinion that this Court has no jurisdiction to entertain an action for the injunction prayed for by plaintiff. We are fortified in this view, we think, by a number of decisions by the Honorable Fifth Circuit Court of Appeals, particularly in the case of Llano Del Rio Company v. Anderson-Post Hardwood Lumber Company, reported at 187 F 2nd 235, affirming in all respects the decision by this Court in the same case reported at 79 Fed Supp, 382 wherein Judge Ben C. Dawkins,

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Sr., in a lengthy opinion, citing many authorities, used the following language, after first pointing out that this was a suit to set aside certain orders and judgments of a state court on grounds of fraud:

> "Conceding, for the purpose of this issue, that all of the charges against the several defendants, including the judges, are true, they do not challenge the jurisdiction of the state court, whose judgments are binding until set aside in the proper forum. The only place where this can be done is in the Court which rendered these judgments and decrees." Citing numerous authorities including Louisiana Code of Practice, Article 604, et seq.
>
> "They are not void, and can be set aside only upon proof of such fraud as a Court of equity would not countenance. There is no reason that can be seen why the complaint filed here could not have been brought in the state court with proper prayers for annulments, etc."

As to the question of res judicata, it is clear, we think, that the matter here presented, i.e., the correct calculation of the amount of money due to the defendant, Mr Connell, was a matter which could have been litigated in all of its aspects before the state court. Instead of having the state court enter its decision upon the matter after full hearing and argument, the parties, through their attorneys of record, entered into a written stipulation on June 9, 1954, which was filed in the record of the state court case on July 11, 1954. The attorney for defendant there, plaintiff here, was Mr. Elias Goldstein, of the Shreveport law firm of Blanchard, Goldstein, Walker & O'Quin, with which this Judge formerly was connected.

The record shows that this stipulation was agreed upon and executed after considerable discussion and

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correspondence between Mr. Scott, representing Mr. Connell, and Mr. Goldstein, representing Dulien, and it appears rather clearly -- in fact, sufficiently clear that we think it may be assumed to be true, that the figure of $22,229.56 agreed upon, was the joint product of compromise or settlement discussions between these counsel. If such be true, under well settled principles of Louisiana Law, such a transaction or compromise may not be set aside at this late date, even though there was error committed, unless it was an error of fact. This is plainly shown by the provisions of Article 2291 of the Louisiana Civil Code. Now here it seems plain to us that the error, if any, was not one of fact but one of law. It is also clear, we think, that the only way in which the judgment based upon that stipulation may be set aside is for the plaintiff here, defendant in the state court case, to bring an action for annulment of that judgment in the state court, and we seriously doubt that the state court would entertain such a suit because again it is noted that the question was one which was available to defendant to litigate, but by deliberate choice of able counsel it did not do so, and we think its mouth is forever closed to contest the propriety or validity of the judgment entered upon the stipulation.

After all, there was no question or dispute as to the facts which entered into the consideration of counsel in making the stipulation. Those facts were known to and conceded by each other. The sole issue of fact was as to whether Connell's duties required him to remain on Dulien's premises thirty hours a week or eighty-four hours a week. In his decision upon that question the state court Judge,

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the Honorable James E. Bolin, ruled that the correct figure was eighty-four hours. It was then and only then that counsel entered into the stipulation and the appeal taken from that ruling and judgment by Judge Bolin was limited solely to that single factual issue. Therefore, it seems to us that the error, if any, which was committed was in interpretation of the Fair Labor Standards Act, and the jurisprudence respecting it, which was nothing but a pure question of law.

Because of this, as indicated in our oral opinion on June 8, 1956, it seems plain that on the merits plaintiff here could not prevail. For these reasons, having again considered all of the briefs filed by both parties through their counsel in this court, and upon reconsideration of the question of jurisdiction, we feel compelled to rule that:

(1) We do not have jurisdiction, because of the provisions of 28 USC 2283;

(2) That, if we do possess valid jurisdiction, still the judgment of the state court is final and res judicata of all questions here presented;

And (3) That in any event, where it appears reasonably clear, as it does here, that the applicant for injunction will not prevail upon a hearing of the merits of the matter, the Court should decline to issue a temporary restraining order or a preliminary injunction.

For these reasons, therefore, the

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motion to dissolve the temporary restraining order, filed by defendant on June 16, 1956, is granted; and the motion to dismiss for lack of jurisdiction, as well as for failure to state a claim upon which relief can be granted, and the motion for summary judgment filed by defendant on June 16, 1956, also are granted, and the suit is dismissed.

MR. SCHUCHAT: If Your Honor please, I would like the record to show that the plaintiff did not have an opportunity to offer to the Court a memorandum of law rebutting the additional material which had been submitted apparently to the Judge by the defendant.

THE COURT: In that respect, I certainly don't want to shut you off without a full hearing and I will permit you to file a memorandum of law in support of your position within fifteen days from this date and a reply to that by defendant's counsel within fifteen days thereafter, following which I will either stand on the ruling made this morning or will recall it and we will proceed from there.

I had considered, as I stated a moment ago, that all available authorities had been cited in your several briefs filed last year when the matter was before the Court at that time.

MR SCHUCHAT: It is apparent from Your Honor's opinion there is certain additional matter which we would like to have an opportunity to answer.

THE COURT: I will grant that. Will fifteen days be satisfactory?

MR. SCHUCHAT: Yes, sir.

I would like to just state briefly -- not

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belabor the point because we will cover it in our brief -- however, the action which the plaintiff has brought is not a suit to set aside a judgment. It is an action to restrain and enjoin the defendant.

THE COURT: I notice also you did not pray for a reformation of the state court judgment.

MR. SCHUCHAT: No, sir. The action for which we pray does not distrub the state court judgment. It, of course, in a direct sense, will enjoin the defendant.

The sole action we will pray for is action against the defendant and there is that distinction that is admittedly close, but there is a definite distinction there and is cited in many cases.

THE COURT: Let me ask you this: Assuming that the Court had taken jurisdiction of the case and had granted a preliminary injunction and a permanent injunction against the enforcement of that state court judgment, what remedy, if any, would the defendant who hold the judgment have?

MR. SCHUCHAT: If Your Honor granted our prayer?

THE COURT: Yes.

MR. SCHUCHAT: He would have a right to appeal from Your Honor's decision.

THE COURT: Suppose that was affirmed? What right would he have?

MR. SCHUCHAT: He will have no right.

THE COURT: Do you admit that he is entitled to

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something?

MR. SCHUCHAT: There is no question but that he is entitled to something.

THE COURT: How would he go about establishing that he is entitled to it?

MR. SCHUCHAT: Your Honor in granting a preliminary injunction, the terms of the preliminary injunction would state that the plaintiff must pay to the defendant the maximum amount to which he is legally entitled.

THE COURT: That is, in effect, seeking to revoke the state court judgment.

MR. SCHUCHAT: We could not come in and ask for this Court to do equity if we were not prepared to do equity ourselves.

If Your Honor would like, I can show a mistake in your computation. Essentially it is this: You computed how much wages Connell should have received during the ninety-seven weeks and you doubled that -- the doubling was for the penalty -- and you subtracted from that now much he received. That is wrong, because you are penalizing the employer. You are giving him a penalty on what he paid.

What you should have done is determine how much more wages he should have gotten and doubled that and not take away.

There will be a slight difference between Your Honor's figure and the $4,800., depending on the 75¢ and

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61¢ point.

THE COURT: Wasn't the sole dispute in the state court whether or not Mr. Connell worked thirty hours a week or worked eighty-four plus hours?

MR. SCHUCHAT: The sole issue litigated in the state court was whether or not Mr. Connell was entitled to be compensated for the fifty-four hours, which was a question by the terms of his employment, which otherwise required him to remain on the premises during that period.

THE COURT: It was determined by the state court after hearing all of the evidence he actually worked eighty-four hours and a fraction per week. He was employed originally, and it was the contention of your claim in the state court he was to work thirty hours a week for $230 per month. Your briefs in the state court show that.

MR. SCHUCHAT: Our contention in the state court with regard to the thirty hours that arose during the trial of the case, when the question arose how many hours it took Connell to perform his duties -- and I was not present -- but from the transcript it is apparent at the counsel table Mr. Scott and Mr. Goldstein agreed that the number of hours which were required for Connell to perform his duties was thirty hours, but he was not employed for thirty hours a week. He was employed to do a certain job which, as a matter of fact, varied quite considerably over a period of the year because I understand he was employed from sundown to sunup, and therefore, how much time he took would vary during winter and summer.

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As an average figure, the two counsel agreed thirty hours was the average amount of time it took him to perform his duties.

There was no stipulation he was employed thirty hours a week at $230 per month.

THE COURT: It was argued by counsel that's all he worked, and therefore, there was no overtime due.

MR. SCHUCHAT: That was the question as to whether he was entitled to compensation when he did not work, but slept, but under the Supreme Court decision in the accepted sense of the word, sleeping is not working.

The issue precisely in the state court which was litigated was whether the 54 hours was compensable, and that was the question which was tried.

MR. SCOTT: May it please the Court, the original petition Connell filed alleged he was employed for only a limited number of hours. We knew we were putting ourselves at a disadvantage in making such allegations but those were the true allegations and, therefore, we made them that way.

There is no evidence in the state court record that Mr. Connell spent fifty-four hours a week sleeping.

The point came up one time and Mr. Connell merely stated that occasionally he got a little sleep, and that's all there was.

THE COURT: I, of course, will consider your briefs

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but in the meantime I must decline to issue the new restraining order which you have asked for yesterday and today and if you would prefer, because of that, Mr. Scott has undertaken to set in motion the state procedure for execution of his judgment, you certainly may file your brief sooner than fifteen days.

MR. SCHUCHAT: We are somewhat in the horns of a dilemma.

THE COURT: As we understood it from Mr. Scott when he brought us his memorandum of authorities yesterday, he could not immediately execute on the state court judgment anyway.

What is the delay you had to go through and what steps would you have to take?

MR. SCOTT: The steps, as I understood it, the bonding company is coming into court Friday. I don't know if the Judge will render a decision from the bench or if he will take it under advisement. I don't know what the bonding company's defense is. They haven't filed an answer. That answer may require the taking of testimony and it will have to be set for that.

Even if the Judge renders a decision from the bench, it seems to me at first blush, that the bonding company may see fit to take a suspensive appeal from that and they have ten days to do it.

I don't believe I can execute against the bonding company for ten days, and that means approximately fifteen days from now.

SIDNEY YOUNG..COURT REPORTER. 418 FEDERAL BLDG.. SHREVEPORT. LA.

I think I have cited everything I have to cite, plus the Court of Appeals opinion which I tender now.

THE COURT: Would you be willing that I render a final decision immediately after receiving his brief, that is, on the question of whether or not we will take jurisdiction?

MR. SCOTT: Your Honor, just in case I receive something new, give me twenty-four hours after I receive their brief. That is plenty of time.

MR. SCHUCHAT: Your Honor, we would not like to let this matter go without assurance there would no execution while the matter is before Your Honor and no steps taken before the State Court.

As I understand what Mr. Scott has said, we would be placing ourselves in the position where -- we might be placing ourselves in such a position if Your Honor ruled adversely to us and gave the same decision as today, he would be able to execute before we would be able to perfect a notice of appeal.

I would like to have Your Honor reconsider, and ask Your Honor to restrain the defendant pending the appeal.

THE COURT: I would not be inclined to do that. That, in effect would be certifying to the Appellate Court I have probable cause to believe that my ruling of this morning is in error, which I do not at this time believe is the case.

MR. SCHUCHAT: Your Honor, I think to grant us a stay, You Honor would not have to consider there was probable cause that

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

Your Honor is wrong, but there was enough issue for an appeal. I think that even a slight study of the problems involved in this case, and we have been into it, convinces everyone this is not a trivial matter but a very substantial question.

THE COURT: If I were to deny the restraining order pending appeal, do you have a right to apply to the Appellate Court for the issuance of a restraining order?

MR. SCHUCHAT: Yes, sir, we would, but I think Your Honor would have to deny it. Your Honor would have to say there was no possible issue involved and that this was a trivial matter.

I think important in this case is the time element which is involved. Your Honor will recall the matter was set down for hearing on the merits at the earliest practical time on July 9, 1956, almost ten months ago, and the defendant, rather than wait until that time for complete disposition of the case, took an appeal and the appea l was rendered in January and the appellant filed a petition for re hearing, which also involved a certain amount of time, and then the appellant apparently intended to apply for a writ of certiorari to the Supreme Court which took still further time.

On March 22, 1957, I believe is the date, the plaintiff first learned that the defendant was taking steps in the state court judgment. So, I think the question of delay could not be raised by the defendant in this case. Therefore, I think it would be the proper and correct decision for Your Honor to restrain any further action pending the appeal.

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

THE COURT: Unless you can show me some strong authorities to the effect I ought to do it, I don't believe I would be inclined to.

I will give you such time as you need, today, tomorrow, or the next day, to do that, but as of now I would not be inclined to do that because, in effect, it would be granting a temporary restraining order which I have already denied.

MR. SCHUCHAT: No, it would not. It would be reserving decision pending appeal.

I cannot see how you can say there is not a substantial question raised in this appeal, because Your Honor rendered two decisions which reflect the uncertainty which existed in Your Honor's mind at the time. Therefore, that alone demonstrates there is a substantial question in the case, and that is all that is necessary.

THE COURT: You get up those authorities and give them to me this afternoon and I will read them and let you know whether or not I will decide to grant the restraining order pending appeal.

MR. SCHUCHAT: Your Honor, our motion also prays for an order to be served on Mr. Connell and Mr. Scott to show cause why they should not be charged in contempt.

Is Your Honor ruling on that motion at this time?

THE COURT: I will not issue that rule because, in the first place, Mr. Scott spoke to the Court before that was done and

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

told us he intended to do it, and while we didn't tell him to do it or not to do it, we knew about it and all he has done so far is to start the machinery in motion.

He has not, in our opinion, been guilty of any contemptuous conduct. Furthermore, we think the opinion by the Fifth Circuit Court of Appeals to the effect that we committed error in granting a restraining order without a definite time limit should be taken into consideration by the Court and there is serious doubt in the mind of the Court as to whether that restraining order which we ordered dissolved this morning had any further legal effect.

MR. SCHUCHAT: Your Honor, I would like the record to show you are ruling on our motion for a contempt order.

THE COURT: Yes, sir. I will be in the office the rest of theday and until tomorrow afternoon at three o'clock, at which time I must leave to go to Monroe for the hearing of a criminal matter Friday. I will return to Shreveport Friday night at approximately eight p. m. and will be in the office Saturday morning, where at ten o'clock that day I have a hearing in another case.

I will be in Shreveport after that until Sunday afternoon, at which time I must return to Monroe to conduct trial calendar there all next week.

The following week I will again be in Monroe, and after that I must go to Opelousas to try a calendar of criminal cases. Shortly thereafter I must return to Shreveport to conduct a trial on the merits in the case of Johnson, et al v. The Mansfield

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

Hardwood Lumber Company, beginning on May 14th, which is expected to last two or three weeks, so that my first real opening in my calendar would be probably some time after June 1st.

I have also taken that into consideration and have been forced to do so in considering whether I should grant another restraining order which could be enforced for only ten days, according to the ruling of the Fifth Circuit even where granted upon notice to the party restrained.

MR. SCHUCHAT: We will get our authorities together and submit them as soon as possible.

THE COURT: All right.

CERTIFICATE

I, SIDNEY YOUNG, Official Reporter, United States District Court, Western District of Louisiana, do hereby certify that the above and foregoing 11 pages of typewritten material contains a true and correct report and transcript of the proceeding had at the time and the place as hereinbefore set out on Page 1 hereof.

IN WITNESS WHEREOF, I have hereunto affixed my signature at Shreveport, Louisiana, on this the 14th day of May, 1957.

/s/ Sidney Young
SIDNEY YOUNG, Official Reporter,
United States District Court,
Western District of Louisiana.

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

DULIEN STEEL PRODUCTS, Inc. Plaintiff,	§	
vs.	§	Civil Action No. 5474
ELBERT B. CONNELL, Defendant.	§	

ORDER DISMISSING CASE

THIS CAUSE Having come on for hearing on defendant's motions to dismiss and for summary judgment, and plaintiff's motion for a further and specific restraining order and for a contempt citation,

It is, therefore, this 3rd day of April, 1957,

ORDERED, ADJUDGED and DECREED, that plaintiff's motion be, and it is hereby, denied; that the temporary restraining order issued herein on June 11, 1956, be, and it is hereby, dissolved; and that all of defendant's motions be granted and the complaint be, and it is hereby, dismissed.

/s/ Ben C. Dawkins, Jr.
United States District Judge

Filed April 3, 1957
Alton L. Curtis, Clerk

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

(Title Omitted)
No. 5474

NOTICE OF APPEAL

NOTICE is hereby given that Dulien Steel Products, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of April 3, 1957, granting defendant's motion to dismiss for lack of jurisdiction; granting defendant's motion to dismiss for failure to state a claim for relief; granting defendant's motion for summary judgment; denying plaintiff's motion for the issuance of an order to show cause why defendant and his agent should not be adjudged in contempt of court; and denying plaintiff's motion for an order specifically restraining defendant from proceeding with his motion for judgment of condemnation filed in Suit No. 16,333, Twenty-Sixth Judicial District Court, Webster Parish, Louisiana.

GEIGER & HARMEL

By: /s/ Michael A. Schuchat
Attorneys for Plaintiff
231 Tower Building
Washington, D. C.

OF COUNSEL:

/s/ Steven N. Cowel
Steven N. Cowel
418 Market Street
Shreveport, Louisiana

April 4, 1957

This is to certify that a copy of the above has been served, personally, upon Leroy Scott, counsel for defendant herein.

/s/ Steven N. Cowel

Filed April 3, 1957
Alton L. Curtis, Clerk

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

CD2228

MATTHEW BENDER & COMPANY

MB

5-57

MICROCARD

TRADE MARK ®

(Title Omitted)
No. 5474

MOTION FOR RESTRAINING ORDER

Upon the verified complaint and all the affidavits and other papers filed and all the proceedings heretofore had herein, the plaintiff moves this Court for an order restraining defendant from attempting to enforce, execute or collect in any manner upon the judgment obtained by him in Case No. 16,333, 26th Judicial District Court for the Parish of Webster, Louisiana, pending the hearing and determination of plaintiff's appeal to the United States Court of Appeals for the Fifth Circuit from the order of this Court entered April 3, 1957, which, inter alia, dismissed the complaint herein, and granted summary judgment for the defendant and for such other and further relief as to the Court may seem just and proper.

GEIGER & HARMEL

By: /s/ Michael A. Schuchat
Attorneys for Plaintiff
231 Tower Building
Washington, D. C.

OF COUNSEL:

/s/ Steven N. Cowel
Steven N. Cowel
418 Market Street
Shreveport, Louisiana

Filed April 3, 1957
Alton L. Curtis, Clerk

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

MINUTE ENTRY

WEDNESDAY SHREVEPORT APRIL 3, 1957

Court met pursuant to adjournment at 10:30 A. M.

Present: Hon. Ben C. Dawkins, Jr., Judge, presiding
Sidney Young, Court Reporter
Alton L. Curtis, Minute Clerk

DULIEN STEEL PRODUCTS, INC.	§	APPEARANCES:
	§	
Vs. No. 5474 Civil	§	Steve N. Cowel and Michael A.
	§	Schuchat, for Plaintiff
ELBERT B. CONNELL	§	Leroy H. Scott and H. Dan
	§	Swayer, for Defendant

This case came on for hearing on application of plaintiff for a temporary restraining order and application for order for defendant and defendant's counsel to show cause why they should not be adjudged in contempt of Court.

The application for order to show cause why the defendant and defendant's counsel should not be adjudged in c ontempt was considered and denied.

The application for a temporary restraining order was argued, brief filed by defendant, submitted and denied.

It was ordered that motions by defendant to dismiss for lack of jurisdiction and to dismiss for failure to state a claim and defendant's motion for summary judgment dissolving temporary restraining order be granted.

In view of the Statement of Plaintiff that it desired to submit further authorities in connection with the Court's refusal to issue temporary restraining order, the Court allowed plaintiff fifteen (15) days

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

in which to file brief and defendant twenty-four (24) hours to reply. Plaintiff counsel then advised the Court that a brief in support of re-consideration of the application for preliminary injunction would be filed within the next day or two.

Later all attorneys reappeared and presented proposed order in accordance with the Court's rulings, which was signed and filed.

Plaintiff filed Notice of Appeal from the Court's ruling granting defendant's motions and denying plaintiff's motion for an order restraining defendant and filed another motion to restrain defendant pending the appeal, which was argued, submitted and taken under advisement until April 6, 1957 unless the Court is advised that a connected matter in State Court has been acted upon earlier. (BCDJR)

At 5:15 P. M., it was ordered that Court be adjourned.

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

DULIEN STEEL PRODUCTS, INC. Plaintiff	§ § §	
vs.	§	Civil Action No. 5474
ELBERT B. CONNELL, Defendant.	§ §	

FINDINGS OF FACT

1.

On May 8, 1956, plaintiff filed its complaint in this action

seeking an injunction restraining defendant from enforcing a judgment obtained in Case No. 16,333, 26th Judicial District, Parish of Webster, Louisiana, and for other relief.

2.

On June 8, 1956, the Court granted and on June 11, 1956, issued an order restraining defendant from enforcing the foregoing judgment until the final decision of the Court on plaintiff's Motion for Preliminary Injunction. At the same time, the Court set down the plaintiff's motion for Preliminary Injunction for hearing on the merits July 9, 1956.

3.

On June 23, 1956, defendant noted his appeal from the Court's action to United States Court of Appeals for the Fifth Circuit.

4.

On January 18, 1957, the United States Court of Appeals for the Fifth Circuit dismissed the appeal therein, and on February 13, 1957, denied a petition for rehearing.

5.

On April 3, 1957, this Court dissolved the temporary restraining order issued on June 11, 1956, concurrently dismissing the complaint filed herein.

6.

On April 3, 1956, plaintiff filed a Notice of Appeal from this Court's action, and filed also a motion for an injunction pending appeal restraining defendant from enforcing in any manner the State Court judgment.

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

7.

The issues raised in plaintiff's appeal are not unsubstantial.

8.

If execution and collection of the State Court Judgment are allowed, plaintiff will suffer irreparable damages and plaintiff's appeal may become moot.

9.

Defendant will, unless enjoined by this Court, execute and enforce payment of said judgment to the great and irreparable damage to plaintiff.

10.

Payment of said judgment is presently secured by a surety bond in the penal sum of $35,000.00 executed by plaintiff, as principal, and the Indemnity Insurance Company of North America, as surety, and an additional $5,000.00 surety bond filed with this Court for damages and attorneys' fees, executed by plaintiff, as principal, and The Indemnity Insurance Company of North America, as surety.

11.

An injunction pending appeal is necessary to preserve the status quo of the parties.

CONCLUSIONS OF LAW

1.

Equity and good conscience and the preservation of the status quo require that during the pendency of plaintiff's appeal the enforcement and collection of the judgment aforesaid be enjoined.

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

Shreveport, Louisiana, April 4, 1957.

/s/ Ben C. Dawkins, Jr.
Judge

Filed April 6, 1957
Alton L. Curtis, Clerk

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

DULIEN STEEL PRODUCTS, INC., Plaintiff,	§	
Vs.	§	Civil Action No. 5474
ELBERT B. CONNEL, Defendant.	§	

ORDER

THIS CAUSE came on to be further heard on motion of plaintiff for an injunction pending appeal, and it appearing to the Court that the relief herein granted is necessary to preserve the status quo pending appeal by the plaintiff to the United States Court of Appeals for the Fifth Circuit for the reasons appearing in the Findings of Fact and Conclusions of Law filed herewith,

IT IS ORDERED this 6 day of April, 1957, that, pursuant to Rule 62(c) Fed. Rules Civ. Proc., from 12:01 a.m. April 6, 1957, until the final decision of the Court on plaintiff's appeal, defendant, his agents, assigns or anyone acting for or through him or on his behalf are hereby restrained and enjoined from attempting to enforce, execute or collect

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

in any manner upon the judgment against plaintiff or the judgment against the Indemnity Insurance Company of North America obtained by defendant in the 26th Judicial District Court for the Parish of Webster, Louisiana, being Case No. 16,333, entitled "Elbert B. Connell v. Dulien Steel Products, Inc."

/s/ Ben C. Dawkins, Jr.
Judge

Service of the above order is accepted, citation and issuance of a formal write of injunction is waived, this waiver to apply to formalities only, all legal rights and defenses being reserved.

Shreveport, Louisiana, this the 6th day of April, 1957, at 11:40 a. m.

/s/ Leroy H. Scott, Jr.
Leroy H. Scott, Jr.
Personally and on behalf of
Elbert B. Connell.

Filed April 6, 1957
Alton L. Curtis, Clerk

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

Marshal's No. 2235
Card 1-3
Date 4-8-57

DULIEN STEEL PRODUCTS, INC.,

Vs.

Civil Action
No. 5474

ELBERT B. CONNELL

INJUNCTION

To Elbert B. Connell, Louisiana Ordnance Plant, Minden, Louisiana,

or Springhill, Louisiana.

GREETING:

By virtue of an Order issued out of the Honorable, the District Court of the United States for the Western District of Louisiana, in the above numbered and entitled cause on the docket of said Court, a copy of said Order and the application therefor, each duly certified under the Seal of said Court, accompanying this Writ; in the name of the President of the United States of America;

You, Elbert B. Connell, your attorneys, agents, servants, and employees, and all other persons acting by or under your authority, direction, or control, are hereby RESTRAINED, ENJOINED, and PROHIBITED from 12:01 a.m. April 6, 1957, until thefinal decision of the Court on plaintiff's appeal, defendant, his agents, assigns or anyone acting for or through him or on his behalf are hereby restrained and enjoined from attempting to enforce, execute or collect in any manner upon the judgment against plaintiff or the judgment against the Indemnity Insurance Company of North America obtained by defendant in the 26th Judicial District Court for the Parish of Webster, Louisiana, being Case No. 16,333, entitled "Elbert B. Connell v. Dulien Steel Products, Inc."

Hereof fail not under penalty of the law.

WITNESS the Honorable Ben C. Dawkins, Jr., Judge of the United States District Court for the Western District of Louisiana, and the seal of said Court, at the City of Shreveport, Louisiana, on this 8th day of April A. D. ;957, and the 181st year of

SIDNEY YOUNG, COURT REPORTER, 417 FEDERAL BLDG., SHREVEPORT, LA.

American Independence.

Alton L. Curtis
Clerk

Teste:
By: /s/ Cecil Cook
Deputy Clerk

U. S. Marshal's Return Marshal's Docket ____ Date 4/9/57

Received April 9, 1957 Executed April 9, 1957

by delivering certified copy of this Writ, together with certified copy of Petition and Order, to the within named Elbert B. Connell in person at 10:50 A. M. at Louisiana Ordnance Plant 22 miles East of Shreveport, La. on Hwy. U. S. 80.

Donald C. Moseley, U. S. Marshal

By: /s/ Emmett G. Wyche
Deputy

Fee: $2.00
Travel 4.40
$6.40

Filed April 9, 1957
Alton L. Curtis, Clerk

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

Marshal's No. 2235
Card 1-4
Date 4-8-57

DULIEN STEEL PRODUCTS, INC.,
VS.
ELBERT B. CONNELL

Civil Action No. 5474
INJUNCTION

To Mr. LeRoy Scott, Attorney at Law, Louisiana Bank & Trust Bldg., Shreveport, Louisiana.

GREETING:

By Virtue of an Order issued out of the Honorable, the District Court of the United States for the Western District of Louisiana, in the above numbered and entitled cause on the docket of said Court, a copy of said Order and the application therefor, each duly certified under the Seal of said Court, accompanying this Writ; in the name of the President of the United States of America;

You, LeRoy Scott, your attorneys, agents, servants, and employees, and all other persons acting by or under your authority, direction, or control, are hereby RESTRAINED, ENJOINED, and PROHIBITED from 12:01 a.m. April 6, 1957, until the final decision of the Court on plaintiff's appeal, defendant, his agents, assigns or anyone acting for or through him or on his behalf are hereby restrained and enjoined from attempting to enforce, execute or collect in any manner upon the judgment against plaintiff or the judgment against the Indemnity Insurance Company of North America obtained by defendant in the 26th Judicial District Court for the Parish of Webster, Louisiana, being Case No. 16,333, entitled "Elbert B. Connell v. Dulien Steel Products, Inc."

Hereof fail not under penalty of the law

WITNESS the Honorable Ben C. Dawkins, Jr., Judge of the United States District Court for the Western District of Louisiana, and the seal of said Court, at the City of Shreveport, Louisiana, on this 8th day of April A. D. 1957, and the 181st year of American Independence.

Alton L. Curtis

Clerk

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

Teste:

By: /s/ Cecil Cook
Deputy Clerk

U. S. Marshal's Return Marshall's Docket _____ Date _____

Received Shreveport, La., 4/8/57 Executed Federal Building, Shreveport, La., 4/8/57 by delivering certified copy of this Writ, together with certified copy of Petition and Order, to Leroy Scott, Attorney at Law, in person.

DONALD C. MOSELEY, U. S. Marshal

Serving: $2.00

By: /s/ Joseph W. Keene,
Joseph W. Keene, Chief Deputy

Filed April 9, 1957
Alton L. Curtis, Clerk

(Title Omitted)
No. 5474

INJUNCTION PENDING APPEAL BOND

WHEREAS, Plaintiff has instituted an action against defendant and is about to apply for an injunction pending an appeal against defendant, enjoining defendant, his agents, assigns or anyone acting for or through him or on his behalf in the execution or collection in any manner upon the judgment obtained by defendant in the 26th Judicial District Court, Webster Parish, Louisiana, Suit No. 16,333, entitled "Elbert B. Connell vs. Dulien Steel Products, Inc.," as in the complaint more particularly described.

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

NOW, THEREFORE, the undersigned, The Indemnity Insurance Company of North America, domiciled in Philadelphia, Pennsylvania, as surety, represented herein by I. Lieber, as attorney-in-fact, in consideration of the premises, and of the issuance of the injunction pending the appeal as stated above, does hereby undertake in the sum of Five Thousand and No/100 ($5,000.00) Dollars, and promise that, if an injunction pending an appeal shall issue, the plaintiff will pay to the party enjoined such damages and/or costs, not exceeding the sum of Five Thousand & No/100 ($5,000.00) Dollars, as they may sustain by reason of the injunction pending on appeal, if the court finally decides that plaintiff was not entitled thereto.

IN WITNESS WHEREOF The Indemnity Insurance Company of North America has caused this undertaking to be signed and its seal affixed by its duly authorized attorney-in-fact at Shreveport, Louisiana, this 4th day of April, 1957.

Indemnity Insurance Company of North America

By: /s/ I. Lieber
Attorney-in-Fact

(S E A L)

Approved as to form:

/s/ Leroy H. Scott, Jr.

The foregoing bond is hereby approved this 6th day of April, 1957.

/s/ Ben C. Dawkins, Jr.
Judge

STATE OF LOUISIANA

PARISH OF CADDO

BEFORE ME, the undersigned authority, personally came and

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

appeared I. LIEBER, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of The Indemnity Insurance Company of North America, and he acknowledged to me that he subscribed the name of The Indemnity Insurance Company of North America thereto as principal, and his own name as attorney-in-fact.

/s/ I. Lieber

SWORN TO AND SUBSCRIBED before me, Notary, on the 4th day of April, 1957.

/s/ Illigible
Notary Public in and for
Caddo Parish, Louisiana.

(S E A L)

Filed April 6, 1957
Alton L. Curtis, Clerk

(Title Omitted)
No. 5474

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Elbert B. Connell, defendant-appellee herein, in the default of a designation by appellant, does hereby designate the following items of the record of the United States District Court in the above numbered and entitled cause to comprise the contents of the record on appeal:

(1) The opinion of the trial court rendered April 3rd, 1957;

(2) The order of the trial court of the same date;

(3) The notice of appeal of the same date;

(4) The motion for an injunction pending appeal;

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

(5) The findings of fact and conclusions of law dated April 4th, 1957;

(6) The order granting the injunction pending appeal dated April 6th, 1957.

All documents and pleadings prior to April 3, 1957 are already before the appellate court due to the previous appeal and the clerk of that court has advised that the same would be considered on this appeal without the necessity of duplication.

In all cases the captions may be omitted.

Shreveport, Louisiana, this the 8th day of April 1957.

MECOM, SCOTT & DESPOT

By: /s/ Leroy H. Scott, Jr.
Leroy H. Scott, Jr.

CERTIFICATE

I hereby certify that I have on this date mailed a copy of the above designation to plaintiff-appellant through its attorneys.

April 8th, 1957.

/s/ Leroy H. Scott, Jr.
Leroy H. Scott, Jr.

Filed April 8, 1957
Alton L. Curtis, Clerk

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

(Title Omitted)
No. 5474

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75(a) and Rule 75(g) of the Federal Rules of Civil Proceedure, the plaintiff-appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed April 3, 1957, the complete record, proceedings, and evidence in this action which has been filed subsequent to that designation of contents filed by defendant-appellant to the United States Court of Appeals for the Fifth Circuit filed June 26, 1956, among other things such record to show:

1. Plaintiff's motion for temporary restraing order and rule.
2. Judge's decision.
3. Memorandum filed by defendant-appellee.
4. Order denying motion for temporary restraining order and rule.
5. Notice of appeal.
6. Plaintiff's motion for injunction pending appeal.
7. Injunction bond pending appeal.
8. Statement of findings of fact and conclusion of law.
9. Injunction.
10. This designation.

/s/ Steven N. Cowel
Steven N. Cowel

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

Shreveport, Louisiana
April 22, 1957

Attorney for plaintiff-appellant
418 Market Street
Shreveport, Louisiana

CERTIFICATE

I hereby certify that a copy of this designation has been mailed to Leroy H. Scott, Jr., by United States mail on this 22nd day of April.

/s/ Steven N. Cowel

Filed April 22, 1957
Alton L. Curtis, Clerk

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

DULIEN STEEL PRODUCTS, INC., Plaintiff,	§	
vs.	§	Civil Action No. 5474
ELBERT B. CONNELL, Defendant.	§	

ORDER EXTENDING TIME

On motion of Dulien Steel Products, Inc., appellant, through undersigned counsel, and upon respectfully showing this Court that the Court Reporter will be unable to complete the transcript to be filed in the United States Court of Appeals by the return date, and upon suggesting to the Court that an extension of time for the filing of same would be appropriate;

IT IS ORDERED that an extension of time herein be granted

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

extending the date ninety (90) days from April 3, 1957, the date on which the Notice of Appeal was filed.

Shreveport, Louisiana, on this 22 day of April, 1957.

/s/ Ben C. Dawkins, Jr.
Judge

GEIGER & HARMEL

By: /s/ Michael A. Schuchat
Attorneys for Plaintiff
231 Tower Building
Washington, D. C.

OF COUNSEL:

/s/ Steven N. Cowel
Steven N. Cowel
418 Market Street
Shreveport, Louisiana

ATTEST: A TRUE COPY

Date April 23, 1957

ALTON L. CURTIS, CLERK

By: /s/ Evelyn B. Friday
Deputy Clerk, U. S. District Court, Western District of Louisiana

Filed April 22, 1957
Alton L. Curtis, Clerk

SIDNEY YOUNG, COURT REPORTER, 416 FEDERAL BLDG., SHREVEPORT, LA.

CLERK'S CERTIFICATE

I, ALTON L. CURTIS, Clerk of the United States District Court, for the Western District of Louisiana, Fifth Circuit, do hereby certify that the foregoing 49 pages contain and form a full, true, correct and complete transcript of the record in case entitled:

LULIEN STEEL PRODUCTS, INC.,

vs.

ELBERT B. CONNELL

No. 5474 on the Civil Docket of this Court, as fully as the original of same remains on file and of record in this office, at Shreveport, Louisiana, the said transcript having been prepared in accordance with Designation filed by counsel in said cause, copy of which accompanies this transcript.

WITNESS my OFFICIAL HAND and seal of this Court, at the City of Shreveport, Louisiana, on this the 28 day of May, A. D., 1957.

ALTON L. CURTIS, Clerk

By: Minnie E. Hall
Chief Deputy

SIDNEY YOUNG, COURT REPORTER, 418 FEDERAL BLDG., SHREVEPORT, LA.

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
APR 23 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 946

DULIEN STEEL PRODUCTS, INC.,
Petitioner,

v.

ELBERT B. CONNELL,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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Dulien Steel Products, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on February 28, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 13) is unreported and is printed at pages 13-20 of Transcript of Record in the Court of Appeals (No. 16753), copies of which are filed herewith. The opinion of the Court of Appeals is reported at 235 F. 2d 556 and is printed in Appendix A hereto, *infra*, p. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1958. (R. 201) Rehearing was denied on March 27, 1958. (R. 226) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The first question presented is whether federal law determines the jurisdiction of a United States District Court to grant relief from a judgment entered in a state court in an overtime compensation suit under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 20, et seq.), where enforcement of the judgment would be inequitable and shock the conscience of the Court.

If the first question is answered in the negative, the following questions are presented:

2. Whether a federal court loses jurisdiction over a claim for equitable relief, specifically recognized by state statute, because the state judicial system provides no forum for the action.

3. Whether Louisiana law precludes an action of nullity to obtain relief from a judgment after an appeal has been taken where the grounds of nullity were not discovered until after the appellate proceedings.

STATEMENT

This action was commenced in the United States District Court for the Western District of Louisiana for an injunction and equitable relief (R. 53). Jurisdiction was invoked under favor of 28 U.S.C. § 1332 and the general equity powers of the Court. (R. 53)

The verified complaint (R. 53-59) averred that respondent had hitherto obtained judgment against petitioner in the District Court for Webster Parish, La., in a suit for

overtime compensation under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq. and that the amount of said judgment was grossly erroneous (aggregating $30,000 instead of $4,812, the maximum allowable under the law) and was the product of the mutual mistake of parties' counsel in computing the quantum for a stipulated judgment. After reciting the details, petitioner averred that unless enjoined, respondent would enforce his judgment, thereby obtaining an unconscionable advantage stemming from the mutual mistake of the parties.

On June 8 and 11, 1956, the District Court denied motions to dismiss and granted a temporary order restraining respondent until final decision on the motion for preliminary injunction which was set for trial July 9, 1956 (R. 100). Respondent appealed to the United States Court of Appeals for the Fifth Circuit (R. 141) which, on January 18, 1957, dismissed the appeal as premature. The decision is reported at 240 F. 2d 414.

On April 3, 1957, the District Court reversed its decisions of June 1956 and dismissed the complaint (R. 31). Petitioner appealed to the United States Court of Appeals for the Fifth Circuit (R. 32).

The Court of Appeals affirmed. The Court held that the case was governed by Louisiana law, because of the diverse citizenship of the parties, notwithstanding the prior judgment having been granted in a suit under a Federal statute to vindicate a federal right. The Court held that the comparable action in Louisiana law—an action of nullity—could not be brought in a Louisiana District Court after an appeal had been taken in the case, citing *Melancon Heirs* v. *Broussard,* 2 La. 8 (1830), and held further that an action of nullity could not have been brought in the appellate courts of Louisiana because said courts, under the Louisiana constitution, possess no original jurisdiction. Judge Cameron concurred in the result.

REASONS FOR GRANTING WRIT

I. This Court Should Settle the Unresolved Question of Which Law—Federal or State—Is Applicable to an Equitable Action in a Federal Court to Obtain Relief from a State Court Judgment Based Wholly on a Federal Right.

The first question presented—choice of law in a suit to obtain relief from a judgment adjudicating a federal right in a state court—is an important one in federal law which should be settled by this Court. The importance of the question is not limited to the Fair Labor Standards Act, which was involved in the case at bar, but extends to many other Federal statutes which create and grant rights enforceable in state courts as well as in Federal courts. This type of concurrent jurisdiction is widespread. Some other examples are: Federal Employers Liability Act, 45 U.S.C. § 56; Securities Act of 1933, as amended, 15 U.S.C. § 77 v; Naturalization Proceedings, 8 U.S.C. § 1421; Action on bond of Internal Revenue officer or employee, 26 U.S.C. § 7402(d); Interstate Commerce Commission Reparation Orders, 49 U.S.C. § 908.

The importance of the choice of law in these cases is illustrated by the case at bar. Jurisdiction to grant relief under federal law is clear. It provides a direct method of obtaining relief from judgments obtained by fraud, accident, duress or mistake (as in the case at bar). Rule 60(b) in the Federal Rules of Civil Procedure provides for relief by motion and also preserves the independent action in equity. The decision of the Fifth Circuit in *West Virginia Oil & Gas Co.* v. *Breese Lumber Co.*, 213 F. 2d 702 (5 Cir. 1954), is illustrative of the relief granted in cases governed by Federal law.

While Louisiana recognizes the independent action in equity to obtain relief from a judgment (denominated an action in nullity), the Fifth Circuit Court of Appeals held

that there is no forum in the Louisiana judicial system which can afford relief where an appeal has been taken in the prior suit. The effect of the decision is that no relief is available in Louisiana against a judgment obtained by fraud, bribery, or other inequitable conduct, if there has been an appeal, even though the grounds for relief are not discovered (as in the case at bar) until after the appellate proceedings.

Conflicting results depending upon choice of law were not intended by Congress when, in enacting the Fair Labor Standards Act, it granted concurrent jurisdiction to state and Federal courts over suits for overtime compensation. Had the suit been brought in the United States District Court, the relief sought herein could be obtained by motion under Rule 60(b) or by independent action, *West Virginia Oil & Gas Co.* v. *Breese Lumber Co.,* supra. The result should not be different because the suit was brought in the state court in Louisiana. Conflicting results in the same cause of action arising under a Federal law are surely contrary to the intention of Congress and encourage the forum shopping which this Court has roundly condemned in *Erie RR Co.* v. *Tompkins,* 304 U.S. 64 (1937) and succeeding cases. The instant case calls for the same uniformity in result which *Erie* requires in diversity of citizenship cases. In diversity cases, this Court has held that the result in a particular case should not differ because of the forum. The same reasoning must apply when a state court is adjudicating a federal right. When it does so, it is, in effect, another federal court and the result in the case should not be different than from that which would obtain were the case tried in the federal court. To allow a different result, as in the case at bar, is to contravene the intention of Congress and foster the same problems in concurrent jurisdiction which this Court intended to solve in diversity jurisdiction by the *Erie* case.

The assertion in the Court of Appeals opinion, that

> "the right of action claimed, that is the right to be relieved from paying the full amount of an allegedly

> erroneous state judgment on the grounds that its enforcement would be unconscionable and inequitable does not arise under the Constitution or a law or treaty or the United States",

disregards the federal statute which is at the core of the case. The only basis of respondent's claim is the Fair Labor Standards Act. The only legal basis for his judgment is that federal statute. The mutual mistake of fact in computing the amount of that judgment was a mistake that arose in computing the amount required by that federal statute. Thus, in a very real sense this case arose under a federal statute and as such should be governed by federal not state law.

The threshold conflict of laws question presented in the case at bar is basic to the entire system of concurrent jurisdiction. Its importance is thus far greater than the result in the instant case because its ramifications extend to all the statutes creating federal rights enforceable concurrently in state and federal courts. The resolution of this question is as important in its field as *Erie* v. *Tompkins* in the field of diversity jurisdiction.

II. If This Court Determines State Law Controlling, It Should Decide Whether a Federal Court Loses Jurisdiction Because the State Provides No Forum for a State Recognized Right.

The Court of Appeals decided that, notwithstanding the federal aspect discussed above, since the parties were of diverse citizenship, the case was governed by Louisiana law. Assuming *arguendo* that this choice of law was correct, there remains an important question of the proper effect of *Erie* v. *Tompkins,* supra. The Court of Appeals determined that the complaint stated a proper claim for relief under Louisiana law, being equivalent to the Louisiana action of nullity. (La. Code of Practice, Article 607, as construed in *Succession of Gilmore,* 157 La. 130, 102 So. 94). However, the court concluded that the holding in the *Melancon* case precluded any Louisiana trial court from juris-

diction because an appeal had been taken in the original action. The Court observed that the Louisiana appellate courts have no original jurisdiction and hence there is no forum in the Louisiana judicial system to adjudicate petitioner's claim for relief. From this the Court concludes that the federal judicial system is similarly impotent. Assuming the Court of Appeals is correct as to Louisiana law, its conclusion as to the impotence of the federal judiciary conflicts in principle with prior decisions of this Court and at least one other circuit court.

In *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1944), this Court held that where a state statute of limitations would bar relief in a state court equitable action, it should have similar effect in a federal court in a diversity of citizenship case. The opinion discusses the broad principles of *Erie* in the following language:

> "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternate tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it." (328 U.S. at 106)

In the instant case the Court of Appeals held that the complaint set forth a claim recognized by Louisiana in its action of nullity. The court's conclusion that the federal court could not give relief because the state court could not is in direct conflict with the principle set forth in the portion of the *Guaranty Trust* opinion quoted above.

The decision of the Court of Appeals also conflicts, at least in principle, with *Griffith* v. *Bank of New York,* 147 F. 2d 899, (2 Cir. 1945) where the Second Circuit upheld jurisdiction of the District Court, in a diversity case, to set aside, ignore or enjoin enforcement of a state court judgment obtained by fraud, even though "motions to set aside a judgment for fraud are not contemplated by the relevant sections of the New York Civil Practice Act." (147 F. 2d at 904)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,753

DULIEN STEEL PRODUCTS, INC.,
Appellant,

v.

ELBERT B. CONNELL,
Appellee

Appeal from the United States District Court for the Western District of Louisiana.

(February 28, 1958)

Before BORAH, TUTTLE, and CAMERON, Circuit Judges.

BORAH, Circuit Judge: When this case was here on a former appeal from an order of the District Court which temporarily restrained the defendant from enforcing a state court judgment "until the final decision of the Court on Plaintiff's Motion For Preliminary Injunction," we held that the order was not a temporary injunction and accordingly dismissed the appeal. Thereafter, and following further proceedings which were had in the court below, the temporary restraining order was dissolved and

the complaint was dismissed. As a result this second appeal followed.

The facts which give rise to this controversy are fully set forth in our prior opinion which is reported in 240 F. 2d 414, and for present purposes they may be summarized as follows: On May 8, 1956, plaintiff filed its complaint praying for a temporary and permanent injunction restraining defendant, upon such terms as the court may deem just, from executing or enforcing a judgment which the latter had theretofore obtained in a Louisiana state district court on the ground that the judgment was unconscionable and based upon mutual mistake of fact. Simultaneously, a motion for preliminary injunction was filed, and on the same day at an informal hearing counsel for the defendant interposed an objection to the jurisdiction of the court, following which it was agreed by and between counsel that the court would consider the question of jurisdiction upon briefs to be submitted. On May 22nd defendant filed motions to dismiss the suit on the grounds: (1) that the court lacked jurisdiction; (2) that the judgment which was affirmed by the Louisiana Supreme Court and in which certiorari was denied by the United States Supreme Court was res judicata; and (3) for failure to set forth a claim upon which relief could be granted. Thereafter, defendant answered the complaint with reservation of his rights under the previous motions. On June 8th, the court overruled the motions to dismiss for lack of jurisdiction and for failure to state a claim; referred the plea of res judicata to the merits; and set July 9th as the date for the hearing on plaintiff's motion for preliminary injunction. Prior to the hearing, and on June 11th, the court granted a temporary restraining order enjoining defendant from attempting to enforce, execute, or collect the judgment until the final decision on the motion for preliminary injunction. Whereupon the defendant moved to dissolve the order of June 11th and for summary judgment. And when

no action was taken thereon, defendant on June 23rd appealed.

In our consideration of the record on this prior appeal, we made the observation that the defendant "should have waited for another two weeks from the date on which he filed this appeal, at which time the trial court could have disposed of the question whether enforcement of the state judgment should be enjoined pending a full trial on the merits." And in this connection we stated further that it was not at all clear that the court below would actually have granted a preliminary injunction, for there "are several legal questions that might well have been passed on at such a hearing." Thereafter, and following the denial of an application for rehearing our mandate was on March 1, 1957, filed with the clerk of the District Court. However, it was not until after the defendant had applied for and obtained from the state district court an order to show cause why the judgment in controversy should not be enforced that plaintiff was moved to action by filing in the court below a second application for an order specifically restraining the defendant from proceeding further in the state court proceeding. Upon notice to the defendant plaintiff's application, together with defendant's motions to dismiss and for summary judgment, came on for hearing on April 3, 1957, at which time the court denied plaintiff's application for a restraining order; granted defendant's motions to dismiss and for summary judgment; and dissolved the temporary restraining order which had therefore been granted on June 11, 1956. Thereupon, plaintiff appealed and moved for and was granted an injunction restraining enforcement of the judgment during the pendency of the appeal.

Appellant's first and principal assignment of error is that the court erred in dismissing the action for want of jurisdiction. We do not all agree. The only possible ground of jurisdiction in the present case is diversity of

citizenship for the right of action claimed, that is the right to be relieved from paying the full amount of an allegedly erroneous state judgment on the grounds that its enforcement would be unconscionable and inequitable, does not arise under the Constitution or a law or treaty of the United States. It exists, if at all under a statute of the state, for diversity jurisdiction must follow state law and policy, and we look to local law to find the cause of action on which suit is brought.

Article 556 of the 1870 Code of Practice provides that:

> "Definitive judgments may be revised, set aside or reversed:
>
> 1. By a new trial.
> 2. By appeal.
> 3. By action of nullity.
> 4. By recission.
>
> "This last mode can only be exercised by minors, or persons who were absent when judgment was rendered against them."

With reference to the action of nullity, Article 607 of the Code of Practice provides that:

> "A definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud, or other ill practices on the part of the party in whose favor it was rendered; as if he had obtained the same by bribing the judge or the witnesses, or by producing forged documents, or by denying having received the payment of a sum, the receipt of which the defendant had lost or could not find at the time, but has found since the rendering of the judgment."

In construing Article 607 the courts of Louisiana have declared that the action of nullity is not limited to the cases specified in the article but, as was stated in *Succession of Gilmore,* 157 La. 130, 102 So. 94, the courts

"will not hesitate to afford relief, against judgments, irrespective of any issue of inattention or neglect, when the circumstances under which the judgment is rendered show the deprivation of legal rights of the litigants who seeks relief and when the enforcement of the judgment would be unconscientious and inequitable. Our courts will follow the general principles of equity jurisprudence applied by the equity courts of the other states of this country in actions of this character." But in *Gilmore* there was no appeal from the judgment sought to be annulled and what the court there said with respect to the action of nullity must be considered in the light of the construction the Supreme Court has placed upon Article 608 of the Code of Practice. This article provides, in pertinent part, that the action of nullity may be demanded only "from the same court which has rendered the judgment, or from the court of appeals before which the appeal from such judgment was taken." In the landmark case of *Melancon's Heirs* v. *Broussard,* 2 La. 8, an independent action was instituted in a state district court to annul a judgment which, as here, had been passed upon on appeal by the Louisiana Supreme Court. There the plaintiff-appellee relied on Article 608 of the 1825 Code of Practice, which is identical with Article 608 of the 1870 Code, and urged that since the Supreme Court possessed no original jurisdiction,[1] judgments of that court "may be attacked on the score of nullity in the Court which rendered the judgment appealed from whether affirmed or reversed by this [Supreme] Court." In rejecting this contention the court tersely said: "This appears to us a *non sequitor.* The Legislature has not given jurisdiction to the District Court and it cannot assume it." To the same effect is *Succession of Martin* v. *Succession of Hoagatt,* 37 La. Ann. 340, wherein the Supreme Court in a vigorous and caustic opinion approved its holding in the *Melancon* case. Since

[1] See Art. IV, § 2, Louisiana Constitution of 1812.

the rendition of these decisions, the Louisiana legislature has not amended Article 608 or enacted any law which would purport to confer jurisdiction on the district courts of the state to grant such relief from a judgment rendered by a state appellate court, and Under Art. VII, §§ 10 and 29 of the Louisiana Constitution of 1921, the appellate courts have no original jurisdiction to entertain such an action. Thus, it appears that since the Supreme Court of Louisiana has authoritatively announced that the right to recover is not available in the state courts, it would contradict the presuppositions of diversity jurisdiction for a federal court in the state to grant such relief, for it is now settled law that diversity jurisdiction must follow state law and policy. *Erie Railroad* v. *Tompkins,* 304 U.S. 64; *Guaranty Trust Company* v. *York,* 326 U.S. 99. Since the cause of action was created by local law, the measure of it is to be found only in local law, and as was said in *Ragan* v. *Merchants Transfer Co.,* 337 U.S. 530, 533, "Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed." In accordance with the foregoing, we hold that the action was properly dismissed, not for the reasons stated by the trial judge in his oral opinion, but for want of jurisdiction of the subject matter.

We have considered the other questions raised by appellant, but in view of our holding we shall refrain from any discussion thereof. And with respect to the point urged by appellee we shall be content to say that we find no merit in his motion to dismiss and for damages for a frivolous appeal. Accordingly, the motion to dismiss the appeal is denied and the judgment appealed from is affirmed.

AFFIRMED.

CAMERON, Circuit Judge: I concur in the result.

JUDGMENT.

Extract from the Minutes of February 28, 1958

[Caption Omitted]

This cause came on to be heard on the motion filed by appellee on September 16, 1957 to dismiss the appeal, and on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the motion to dismiss the appeal in this cause be, and the same is hereby, denied; and that the judgment of the said District Court appealed from in this cause be, and it is hereby, affirmed;

It is further ordered and adjudged that the appellant, Dulien Steel Products, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"CAMERON, Circuit Judge, concurs in the result."

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Petitioner

vs.

ELBERT B. CONNELL,
Respondent

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

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Respondent

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Elbert B. Connell prays that this Honorable Court refuse to grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of that court entered on February 28, 1958.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana which is sought to be reviewed by the whole federal court proceeding is *Elbert B. Connell vs. Dulien Steel Products, Inc.*, 85 So. 2d 3, certiorari denied, 351 U.S. 926, Case No. 805, October term 1955.

The original opinion of the United States District Court for the Western District of Louisiana is in the record at pages 82-107, otherwise unreported.

The opinion of the United States Court of Appeals for the Fifth Circuit on the first appeal is found at 240 F. 2d 414.

The opinion of the District Court after remand from the Court of Appeals is in the record at pages 13-20, otherwise unreported.

The opinion of the Court of Appeals that is sought to be reviewed on certiorari is found at 252 F. 2d 556. This was the second federal appeal in this case.

JURISDICTION

Petitioner seeks jurisdiction under 28 U.S.C. 1254(1). Respondent denies there is any jurisdiction to review this case because:

1. This is an action to enjoin the enforcement of a state court judgment. It is unquestioned that the state court had jurisdiction of the parties and the subject matter and that the judgment was responsive to the pleadings. Under such circumstances the prohibition found at 28 U.S.C. 2283 is fundamental and the same denies jurisdiction to the Federal Courts for such injunctive action.

2. This Honorable Court has already denied certiorari in this cause on a previous occasion. At that time Dulien presented the same arguments regarding quantum and sought the same relief as it now seeks. 351 U.S. 926.

3. Dulien has waived any right which it might have for certiorari by acquiescing in the judgment of the United States Court of Appeals.

STATUTE INVOLVED

Petitioner has failed to set forth any constitutional provision, treaty, statute, ordinance or regulation which the case involves. Petitioner cannot cite such for there are no such provisions that give authority to federal courts to review or annul the final judgments of state courts. This is especially true where such final judgment has already been considered by this court on denial of application for certiorari as in the case at bar. 351 U.S. 926.

The most pertinent statute is one that takes jurisdiction away from federal courts;

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments." 28 U.S.C. 2283.

Petitioner has failed to cite any authority which would bring the case at bar within any recognized exception to the above prohibition.

Rule 56 (4) of this court is applicable:

> "Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

QUESTIONS PRESENTED

Dulien has listed three questions, but they all can be summarized and clarified as follows: *Do the federal courts have the power to review, modify or annul a final judgment of the Louisiana Supreme Court on the ground that the same is erroneous?* Of course, we admit that in proper cases this court has the power on writ of certiorari to such court, but after this court denies such a writ, can the applicant move into the lower federal courts to accomplish the same thing?

If the above question is answered in the affirmative, then the additional question; which law controls, federal or state, becomes important.

Though not at first blush apparent, another question presented is *whether a litigant is at liberty to assert a defense by piecemeal, presenting a part only of the available defenses, reserving others for a separate suit if the ones presented are unsuccessful.*

Still another question is whether the court should grant certiorari in a case where it is doubtful that the applicant would prevail because of other legal questions not mentioned in the Court of Appeals opinion, but which were considered by the district court and which were fully presented, briefed and argued at all stages of the proceeding.

Of course, the vital matter of jurisdiction is always presented.

Respondent presents the question of whether there is ground for the writ in question so as to justify the imposition of damages by the court pursuant to rule 56 (4).

STATEMENT OF THE CASE

A statement of the whole case, including the original state court action is quite necessary to understand this somewhat complicated situation.

In 1952 Connell sued Dulien in the Louisiana State Court system under the wage and hour provisions of the Fair Labor Standards Act. Dulien admitted employment and coverage, basing its defense entirely on a novel factual question, in effect as follows: Connell (a night watchman) was only required to be present during the actual time necessary to make a round of the watchman's station clocks (about 45 minutes for each round); that he had to do this only five times a night; that he was not employed or on duty in between these rounds (though he was actually physically present); that he only worked four or five hours each night (stipulated to be 30 hours per week—Record in case 805, October term 1955, page 141); that he was never told he would have to stay on the premises between rounds; that he had been paid for his 30 hours per week and thus was not due any additional sums.

The trial judge found for Connell and in regard to quantum, stated,

> ". . . if counsel for plaintiff and defendant cannot agree on the amount I will pass on that at a later date, after having received a brief on that question alone." (R. 134)

On the previous application to this court for certiorari in May of 1956 we stated on page 6 of our brief: "Pursuant to his suggestions counsel for plaintiff and

counsel for defendant got together, *and after some measure of disagreement*, finally agreed between themselves as to the proper amount to be awarded." The record at that time did not, of course, show the measure of disagreement, but this record is not so deficient and we pause to consider this for a moment.

Attached to Dulien's first petition in the federal courts are found exhibits A, B, B-1, and C which show some of the negotiations. (R. 61-68, 135-137) It should be noted at this time that the very computation now urged by Dulien was advanced at that time, exhibit B-1. (R. 67-68) This was voluntarily abandoned by Dulien in 1954 only to be resurrected after all other defenses had failed and the judgment had become final.

From the decision of the state court Dulien appealed and presented to the Louisiana Supreme Court the same issues presented in the trial court, stipulating in oral argument that the amount was not in dispute, which stipulation was recognized by the court in its opinion:

> "Counsel have entered into an agreement that the amount awarded by the district court is correct if the plaintiff was required under his employment to remain on the premises overnight." 85 So. 2d 3.

Dulien thus again deliberately waived any arguments on quantum, although they were in possession of the computation they now contend is the correct one. Exhibit B-1 (R. 67-68).

Rehearing was denied and a later motion to remand for a recomputation of the quantum was also denied. This

was the very first time there was any dispute presented to the courts on the issue of quantum, even though all of these basic facts had been in Dulien's possession all along.

Dulien then applied to this court for certiorari, the issue of quantum being the one urged by them. Certiorari was denied May 7th, 1956, 351 U.S. 926.

The following day Dulien filed the present suit in the United States District Court for the Western District of Louisiana (R. 53 et seq), asserting jurisdiction in diversity and praying for a temporary and permanent injunction against the enforcement of the state court judgment. Connell filed motions to dismiss based upon jurisdiction, res judicata and failure to state a claim. (R. 71-72). The district court granted a restraint against enforcement of the state court judgment which by its terms did not expire within ten days. (R. 116-117) Connell filed a motion to dismiss and for summary judgment and when no action was taken thereon, appealed. The United States Court of Appeals dismissed the appeal as premature, but discussed the case in some detail. 240 F. 2d 414. Rehearing was denied February 13, 1957. Six weeks later the district court held a hearing at Dulien's instance and at that time dismissed the complaint and granted summary judgment for Connell. The opinion of the district court is well reasoned and discusses many of the aspects of the case. It is found at page 13-30 of the record. It shows why, even if the reasons given by the Court of Appeals are not correct, the complaint should nevertheless fail.

Dulien took an appeal. The United States Court of Appeals affirmed, but on different grounds than that given by the district judge. 252 F. 2d 556. Rehearing was denied March 27, 1958.

On *April 7, 1958*, Dulien went back to the Louisiana State Court System and filed in the original trial court a petition to set aside the original state court judgment. Included in the allegations of that petition are the following:

> "18. That, in accordance with Connell's arguments, the United States Fifth Circuit Court of Appeals on March 27, 1958 upheld the plea of lack of jurisdiction.
>
> "19. That, based upon such ruling and upon contention of Connell that this Honorable Court is the only court having proper jurisdiction, the aforementioned pleadings are here presented; . . ."

A full faith and credit certified copy of said pleadings have been forwarded to the Clerk of this Court for inclusion in the record of this case.

On *April 23, 1958*, the present petition for certiorari was filed.

ARGUMENT

There is no jurisdiction in the Federal Court System to enjoin state court proceedings because of the prohibition found at 28 U.S.C. 2283

The above statute is set forth in full hereinabove, page 3. It is well settled that the prohibition is to the result rather than the manner of obtaining that result, that is, the rule cannot be circumvented by directing the

injunction to the parties rather than to the state court. *Oklahoma Packing Co. vs. Oklahoma Gas and Electric Co.*, 309 U. S. 49; *Peck vs. Jenness*, 48 U.S. 612, 624. It is likewise well settled that the term proceeding includes proceedings in execution of any judgment obtained in the state court. *Hill vs. Martin*, 296 U.S. 393, 403.

In the case at bar there is certainly no express act of congress, nor is there a federal judgment to protect or effectuate. The phrase, "in aid of its jurisdiction" according to the revisors notes to section 2283, was added to conform to section 1651 (the all writs section) of title 28 and to make clear the recognized power of the Federal Courts to stay proceedings in state cases removed to the District Court.

The cases support this view, the most recent being *Amalgamated Clothing Workers of America vs. Richmond Brothers*, 348 U. S. 511. There, this court said:

> "A district court's assertion of equity power or its denial may in turn give rise to appellate review on this collateral issue. There may also be added an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties."

The above statement is almost prophetic. Here Dulien seeks to enjoin the enforcement of a state court judgment, affirmed on appeal to the highest state court and in which this court has already denied certiorari. This case has been in the courts for over six years and for the past two years the element of federal-state competition has been exploited so as to complicate matters and to frustrate the execution of a state court judgment obtained

in a case where there has never been any question of jurisdiction over subject matter or parties and where the judgment was responsive to the pleadings originally presented.

This doctrine is not new, even though Professor William Moore has only recently become reconciled to it. See *Moore's Federal Rules and Official Forms, 1956, page 330*, where he now recognizes, as the result of the Amalgamated case, supra, that section 2283 is to be read literally and against federal power. In Amalgamated this court refused to enjoin even where it was apparently admitted that the state court had no jurisdiction in the premises. A fortiorari, when the state court has acted within the bounds of its jurisdiction, the same result should apply.

For years this court has applied similar rules. Where litigation ran the gamut in the state courts this court has clearly stated that the ultimate vindication of federal rights lies with this court, not with any other court, solely and exclusively—by appeal or certiorari but not by new action in the lower federal courts. *Southern Railway vs. Pointer*, 314 U. S. 155. In *Parnocher vs. Mount*, 207 F. 2d 788, 791, it was said:

> "Even though a question of Federal law is presented in a case in a state court if the court has jurisdiction of the subject matter and of the parties and after hearing enters a judgment which is responsive to the issues and the judgment is affirmed by the highest court of the state, no court of the United States other than the Supreme Court on appeal or certiorari has jurisdiction to review, vacate or annul such judgment. Even though it is contended such a judgment involves a denial of federal rights, the

> question cannot be reviewed in the courts of the United States except on appeal or certiorari to the Supreme Court. Angel vs. Bullington, 330 U.S. 183."

And, in *Angel vs. Bullington*, supra, this court said:

> When an asserted federal right is denied, the sufficiency of the denial is for this court to decide. (he) could have come here, not merely by the grace of this court on certiorari, but on appeal . . .
> *He cannot begin all over again in an action involving the same issues before another forum in the same state.*" (Emphasis ours)

The district court was striving for the same thing when the plea of res judicata was sustained, for, once again, as this court said in *Angel vs. Bullington*, supra,

> "If tolerated, our federal system would afford fine opportunities for needlessly multiplying litigation in this way. The doctrine of res judicata is a barrier against it. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if by fair process a controversy has once gone through the courts to conclusion . . . and it has gone through if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

That the question of quantum was involved, or could have been involved is abundantly clear from the record. The state trial judge stated he would pass on quantum after receiving a brief on that subject alone (R. 131-134). Dulien filed a motion for hearing as to quantum (R. 135-136). The judgment and stipulation of counsel show the

same (R. 137-138). *Exhibits B and B-1, attached to Dulien's original petition in the federal courts clearly show that they were well acquainted with the now asserted method of computation well before the initial judgment was obtained. (R. 62-64, 67-68) and by deliberate choice, did not argue the point.*

The Court of Appeals was right in its determination of the state law.

The opinion of the United States Court of Appeals for the Fifth Circuit is so direct and to the point that it would be difficult to add anything to it. Dulien in brief does not even make the contention that the court's interpretation of the Louisiana Law is erroneous. That state law is controlling is clear from the opinion. It is reinforced by the opinions of the legal writers. We are not cited to any federal law that would allow the right sought to be asserted by Dulien, even under the completely unwarranted assumption that their allegations are true.

> "Erie Tompkins dispelled the notion of a federal general common law. State law must, then, determine whether the party seeking relief has an equitable cause of action, and this is true whether the judgment under attack was rendered in an action involving state law or federal law, for the claim is merged into the judgment; and an action to obtain relief from that judgment involves a different claim, which does not involve a federal matter." 7 Moore, Federal Practice, 626.

The Court of Appeals reached the same and identical conclusion in language so clear as to be almost startling. It was a correct conclusion.

"We believe it is logical and practical to hold that state law prescribes the basis for the additional remedial attack on the judgment through the independent action as a facet of its general power to determine the res judicata effect of its judgments." 7 Moore, Federal Practice, 634.

This Court Has Already Denied the Relief Dulien Here Seeks

Dulien presented to the Louisiana Supreme Court in January 1956 a motion to remand the case for recomputation of the quantum. On denial Dulien sought certiorari on the issue of quantum. It was for "this court to decide" whether the denial was sufficient or not. Angel vs. Bullington, supra. In May, 1956 this court denied certiorari, thus deciding the matter and terminating the litigation. Dulien should not be at liberty thereby to start on the long march to again knock at these portals via the federal court system. Dulien has tried it, though. To permit it would be to invite a multiplicity of litigation such as this court has never seen. A denial of certiorari should serve as something more than an open invitation to start all over again, especially when the grounds urged were available and known to complainant at all times. See exhibits B and B-1 annexed to Dulien's original complaint. (R. 62-64, 67-68) This alone should be sufficient for the imposition of damages pursuant to Rule 56(4).

Dulien Has Waived Its Rights For Certiorari by Acquiescence in the Judgement

Sixteen days before this application for certiorari was filed Dulien instituted an action in the state district court that heard the case originally, and in that action

specifically recognized and acquiesced in the opinion of the Court of Appeals. In article 19 of that petition (supra, pg. 8) they declared that the action was being taken based upon the ruling of the Court of Appeals. It is a fundamental proposition that acquiescence in a decision destroys the right to further review of the same.

OTHER REASONS

There are a number of other reasons why Dulien's complaint would not be successful other than those mentioned by the United States Court of Appeals for the Fifth Circuit. These are touched upon by the opinion in the United States District Court for the Western District of Louisiana (R. 13-20) and more fully set forth in our brief in the second appeal, apparently in the record, but we have been unable to determine at just what pages. Briefly they concern the fact that a proper case in equity was never presented to the federal courts for two reasons:

1. Dulien asks the aid of an equity tribunal for relief from a judgment on account of a defense, which if good anywhere was good at law, and which they were not prevented from using at law, either by any act of Connell, or by any lack of ability on their own part. *Marine Insurance Company vs. Hodgson*, 7 Cranch 332; *In re Innis*, 140 F. 2d 479; *Pommeroy, Equity Jurisprudence*, Section 1361 A.

2. In Dulien's original petition (R-57), allegation 8, we see that under the calculation now urged by it the hourly rate of Mr. Connell would have been only 61 cents per hour rather than $1.72 as used. Thus Dulien pleads before an equity tribunal, in mitigation of damages, that in addition to violating

> Section 7A of the Act, they also violated Section 6A1. This violates the "clean hands" doctrine and removes the case from equitable considerations, if indeed any ever existed.

There is also the matter of the plea of Res Judicata, partly presented hereinabove, but also based on such cases as *Partmar Corporation vs. Paramount Pictures*, 347 U.S. 89, *Grubb vs. Public Utilities Commission*, 281 U.S. 470 and *Angel vs. Bullington*, 330 U.S. 183.

An additional matter is whether the error, if any, was only an error of law for which no relief might be granted; the matter of a compromise agreement and several other matters not presented but which would have to be argued on the merits should this case ever be tried. They are mentioned briefly in our previous certiorari opposition and need not be detailed here.

And, of course, Dulien's allegations are not true in the first place, as the record will reveal and as detailed hereinbefore and hereinafter.

DAMAGES FOR RESPONDENT'S DELAY

Because there is so very little ground for the issuance of the writ of certiorari in this case, respondent feels that he should be granted damages for the delay occasioned by this application. In a similar case in the past, *Grubb vs. Public Utilities Commission*, 281 U.S. 470, the court, after granting the writ of certiorari and then discovering that, as in the case at bar, the matters sought to be raised had been raised, or at least were available to be raised in an earlier proceeding, granted a motion to dismiss without awaiting oral argument, saying:

> "It was incumbent on the appellant to present in support of his asserted right of attack, every available ground of which he had knowledge. He was not at liberty to prosecute that right by piece meal or by presenting a part only of the available grounds and reserving others for another suit if failing in that. (citations)
>
> "As the ground just described was available but not put forward, the appellant must abide by the rule that a judgment upon the merits in one suit is res judicata in another where the parties and the subject matter are the same. Not only as respects matters actually presented to sustain or defeat the right, but also as respects any other available matter which might have been presented to that end. (citations)
>
> "We think it follows from what has been said . . . that the objections . . . . are so unsubstantial that the motion to affirm without waiting oral argument should be sustained."

The court further made the observation:

> "The case in the state court was so far identical with the suit in the Federal Court as respects subject matter and parties that there can be no doubt that the judgment in the former, unless invalidated by some jurisdictional infirmity operated to bar the further prosecution of the latter."

It only remains for us to show that the issue of quantum, which Dulien wishes to re-litigate in the federal courts was available at all times to them in the state proceeding. The United States District Judge recognized that such was the case when he stated in his opinion:

> "It is noted that the question was one which was available to defendant to litigate but by deliberate choice of able counsel it did not do so and we think its mouth is forever closed to contest the propriety or validity of the judgment entered upon the stipulation." (R. 70)

The correspondence found attached to Dulien's original petition as exhibits A, B, B-1, and C (R. 62-68), as well as the motion for a hearing on quantum (R. 135-136) conclusively fortify the District Judge on that point.

If a matter is so unsubstantial as to justify summary dismissal without awaiting oral argument, it is unsubstantial enough to justify the imposition of damages for the delay, pursuant to rule 56 (4).

CONCLUSION

The federal courts are without jurisdiction for the following reasons:

1. The prohibition of 28 U.S.C. 2283.
2. The petition seeks in a diversity case, relief not allowed by the state law of the situs.
3. Certiorari has already been sought and denied once on this claim.
4. Dulien has waived any right to certiorari by acquiescence in the judgment.

A proper case in equity was not presented for the following reasons:

1. The petition does not set out or detail any reason why this defense was not exerted in the first place, even though the same was within the knowledge of Dulien at that time.

2. The complaint, though seeking equitable relief, clearly shows that the basis for this relief is a further violation of the Fair Labor Standards Act.

The claim is res judicata for the following reasons:

1. The defense urged has at all times been available to Dulien.

2. The State Court had jurisdiction of the subject matter and of the parties and entered a judgment which was responsive to the pleadings.

No error was made.

Any error which might have been committed was not mutual nor was it any more than an error of law for which no relief is permitted.

The quantum in the state court judgment resulted from a compromise.

The points presented are so unsubstantial as to justify the imposition of damages in favor of respondent.

The petition for certiorari should be denied, and damages should be awarded Respondent for the delay occasioned by these proceedings.

Respectfully submitted,

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By:

Philip H. Mecom

I hereby certify that a copy of this brief has been served upon opposing counsel herein by depositing a copy in the United States Mail, properly addressed on this the ..... day of May, 1958.

.....

Philip H. Mecom